

Order

Entered: October 5, 2004

Supreme Court
Lansing, Michigan

Maura D. Corrigan,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman,
Justices

ADM File No. 2000-32

Administrative Order No. 2004-6

Minimum Standards for Indigent
Criminal Appellate Defense Services

On order of the Court, this is to advise that the Court has considered revised minimum standards for indigent criminal appellate defense services proposed by the Appellate Defender Commission pursuant to 1978 PA 620, MCL 780.711 to 780.719. The Court approves the standards with some revisions replacing those adopted in Administrative Order No. 1981-7, effective January 1, 2005.

PREAMBLE:

The Michigan Legislature in MCL 780.712(5) requires the Appellate Defender Commission to develop minimum standards to which all criminal appellate defense services shall conform. Pursuant to this mandate, these standards are intended to serve as guidelines to help counsel achieve the goal of effective appellate and postjudgment representation. Criminal appellants are not constitutionally entitled to counsel's adherence to these guidelines. Hence, counsel's failure to comply with any standard does not of itself constitute grounds for either a claim of ineffective assistance of counsel or a violation of the Michigan Rules of Professional Conduct, and no failure to comply with one or more of these standards shall, unless it is independently a violation of a rule of professional conduct, serve as the basis for a request for investigation with the Attorney Grievance Commission.

Standard 1

Counsel shall promptly examine the trial court record and register of actions to determine the proceedings, in addition to trial, plea, and sentencing, for which transcripts or other documentation may be useful or necessary, and, in consultation with the defendant and, if possible, trial counsel, determine whether any relevant proceedings have been omitted from the register of actions, following which counsel shall request preparation and filing of such additional pertinent transcripts and review all transcripts and lower court records relevant to the appeal. Although the trial court is responsible for ordering the record pursuant to MCR 6.425(F)(2), appellate counsel is nonetheless responsible for ensuring that all useful and necessary portions of the transcript are ordered.

Standard 2

Before filing the initial postconviction or appellate motion or brief and after reviewing the relevant transcripts and lower court records, counsel must consult with the defendant about the proposed issues to be raised on appeal and advise of any foreseeable benefits or risks in pursuing the appeal generally or any particular issue specifically. At counsel's discretion, such confidential consultation may occur during an interview with the defendant in person or through an attorney agent, by a comparable video alternative, or by such other reasonable means as counsel deems sufficient, in light of all the circumstances.

Standard 3

Counsel should raise those issues, recognizable by a practitioner familiar with criminal law and procedures on a current basis and who engages in diligent legal research, which offer reasonable prospects of meaningful postconviction or appellate relief, in a form that protects where possible the defendant's option to pursue collateral attacks in state or federal courts. If a potentially meritorious issue involves a matter not reflected in the trial court record, counsel should move for and conduct such evidentiary hearings as may be required.

Standard 4

When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims *in propria persona*. Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court. The defendant's filing *in propria persona* must be received by the Court of Appeals within 84 days after the appellant's brief is filed by the attorney, but if the case is noticed for submission within that 84-day period, the filing must be received no later than 7 days before the date of submission, or within the 84-day period, whichever is earlier. The 84-day deadline may be extended only by the Court of Appeals on counsel's motion, upon a showing of good cause for the failure to file defendant's pleading within the 84-day deadline.

Standard 5

An appeal may never be abandoned by counsel; an appeal may be dismissed on the basis of the defendant's informed consent, or counsel may seek withdrawal pursuant to *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and related constitutional principles.

Standard 6

Counsel should request oral argument, and preserve the right to oral argument by timely filing the defendant's brief on appeal. Oral argument may be waived if counsel subsequently concludes that the defendant's rights will be adequately protected by submission of the appeal on the briefs alone.

Standard 7

Counsel must keep the defendant apprised of the status of the appeal and promptly forward copies of pleadings filed and opinions or orders issued by a court.

Standard 8

Upon final disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued as a result of that disposition, and the scope of any further representation counsel may provide. If counsel's representation terminates, counsel shall cooperate promptly and fully with the defendant and any successor counsel in the transmission of records and information.

Standard 9

Upon acceptance of the assignment, counsel is prohibited from seeking or accepting fees from the defendant or any other source beyond those authorized by the appointing authority.

YOUNG, J. (*dissenting*). I respectfully dissent from this Court's adoption of Standard 4. As we held in *People v Adkins (After Remand)*, 452 Mich 702, 720 (1996), a criminal defendant has a constitutional right of self-representation or to counsel, but not both. The "right" to which Standard 4 refers—assistance from counsel when a defendant proceeds *in propria persona*—is a hybrid right that has no basis in law.

Additionally, by adopting Standard 4, this Court potentially places counsel who assists a defendant proceeding *in propria persona* in an ethical dilemma. Standard 4 requires counsel to assist the criminal defendant with a claim even after counsel has made a professional judgment that the claim is unwise, improper, or without merit. This obligation may conflict with counsel's duties under Rules 1.2(c), 3.3(a), and 8.4 of the Rules of Professional Conduct.

While I continue to believe that a criminal defendant has no right to assistance of counsel when proceeding *in propria persona*, and therefore dissent from the adoption of Standard 4, I

believe that the following sentence should be added to Standard 4 to address the potential ethical dilemma that counsel may face:

Nothing in this provision shall be construed as requiring counsel to assist in an unethical act or in behavior inconsistent with the Rules of Professional Conduct.

CORRIGAN, C.J., concurs with YOUNG, J.

Staff Comment: The Appellate Defender Commission submitted proposed revised standards for indigent criminal appellate defense services. The revised standards replace those adopted in Administrative Order No. 1981-7, effective January 1, 2005.

Standard 1 corresponds to former Standard 6 regarding counsel's obligation to review the lower court records and promptly request and review the transcripts. Standard 1 recognizes that pursuant to MCR 6.425(F)(2), the trial court bears the primary responsibility for ordering the record, but also highlights counsel's responsibility for ensuring that the trial court orders all useful and necessary portions of the transcript.

Standard 2 corresponds to former Standards 3 and 4, which related to counsel's obligation to consult with the client about the appellate issues and any foreseeable risks or benefits in pursuing the appeal. It clarifies that counsel generally should warn defendant not only of the risks and benefits of pursuing the appeal, but also the risks and benefits of pursuing a particular issue. This standard does not mandate a personal meeting with the defendant as did former Standard 3

Standard 3 corresponds to former Standard 9, regarding counsel's duties to raise issues that offer reasonable prospects of meaningful postconviction relief and to former Standard 8, regarding counsel's obligation to move for and conduct any necessary evidentiary hearings.

Standard 4 corresponds to former Standard 11 regarding briefs filed by defendants *in propria persona*. This standard sets a deadline for the filing of such briefs of 84 days from the date that the attorney files the appellant's brief. The standard continues the requirement that appellate counsel provide the defendant with clerical assistance in filing the brief *in propria persona* and allows extensions of this deadline only upon a showing of good cause for the failure to file the defendant's brief within the 84-day deadline.

Standard 5 replaces former Standard 12 regarding dismissal of the appeal. It deletes the requirement for written consent and allows counsel to dismiss the appeal on the basis of the defendant's "informed consent." It also allows counsel to seek permission to withdraw where, in counsel's opinion, there are no meritorious appellate issues.

Standard 6 incorporates the principles articulated in former Standards 15 and 16 relating to counsel's obligation to timely file the defendant's pleadings and request and present an oral argument on the defendant's behalf.

Standard 7 is a more concise version of former Standard 17, but its provisions are essentially identical. Counsel is required to keep the defendant apprised of the appeal and send the defendant copies of pleadings and court orders or opinions.

Standard 8 incorporates the requirements of former Standards 18 and 19. It states that upon the court's final disposition of the case, counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued and the scope of any further representation counsel may provide. If the Court of Appeals disposition terminates counsel's representation, counsel shall cooperate fully with the defendant or successor counsel in the transmission of records and information.

Standard 9 corresponds to former Standard 20, prohibiting appointed counsel from seeking or accepting fees from the defendant or any other source beyond those authorized by the appointing authority.

The staff comment is not an authoritative construction by the Court.



I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 5, 2004

Corbin R. Davis
Clerk